Board is really left in the dark as to what the factual position was in Malaysia at the critical time. Lieutenant Sutikno the Indonesian officer in charge of the party of Indonesian soldiers and others including the accused said that the purpose of coming to Malaya was to liberate the people of Malaya from British Imperialism and to do sabotage work in order to crush the economy of Malaya. Although apparently there had been on this occasion an armed conflict between the Indonesian Armed Forces and Malaysian soldiers, centring about their attempted capture, it is not known whether a state of war existed between the two States. If any exception from the generality of section 57(1) is permissible, these considerations might have had an important bearing on the question whether the section applied to the Indonesian Forces at the time the accused were collaborating in Johore with them. Owing to the failure of the accused to take the point on the relevancy of the charge at the trial the matter has been left in doubt. But it is in our view too late to raise it before the Board.

We would have advised that the appeals in these cases also be wholly dismissed.

Appeals Nos. 15, 16 and 17 of 1967 allowed to the extent stated (see p. 155 ante); other appeals dismissed, save that convictions under section 58 of the Internal Security Act, 1960, quashed.

Solicitors: *Stephenson, Harwood & Tatham; Graham Page & Co.; Garber, Vowles & Co.*

SAAD IBRAHIM v. PUBLIC PROSECUTOR

[A.Cr.J. (Yong J.) December 7, 1967]

[Alor Star — Criminal Appeal No. 82 of 1967]

Arms and Ammunition — Possession — Meaning of — Motive for planting arms and ammunition — Presumption — Onus — Explanation consistent with innocence — Arms Act, 1960, ss. 9(a) & 47(2).

The accused, now the appellant, was convicted on two charges under section 9(a) of the Arms Act 1960 for having under his control (i) one 12-bore pistol and (ii) one round of 12-bore cartridge without an arms licence or permit, and was sentenced to six months imprisonment on each charge, the sentences to run concurrently.

The facts of the case are simple. The police on information received searched the accused's house, and found the pistol and ammunition in the zinc gutter near the kitchen roof of the accused's house. The accused in his defence strenuously denied that the pistol and ammunition were his or that he had any knowledge of their existence. He explained that they must have been planted there by informers. On inspection, the court, the defending counsel and the deputy public prosecutor found that the zinc gutter where the pistol and ammunition were discovered was a place easily accessible to anyone standing outside the kitchen walls and the weapon could have easily been placed there without the knowledge of the inmates of the house. The learned president in rejecting the accused's explanation held that the accused had failed to provide any explanation as to why people should want to put him into trouble by planting the pistol in his house. He (the accused) could not even name any person who was likely to be his enemy or who had any grudge against him.

Held: (1) possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case;

(2) the learned president had overlooked the fact that the motive for planting arms and ammunition into another man's house need not necessarily be enmity or revenge. Such motive has frequently been found to have been impelled by tempting rewards offered by the police. Under section 38 of Arms Act, even the court in case of conviction, is authorised to pay out of the fines imposed, awards to the informers;

(3) in the instant case, the accused had given an explanation which was consistent with his innocence and if the learned president disbelieved his explanation, he should have considered it might have reasonably been true although not convinced of its truth. He had failed to do this.

Cases referred to:—

(1) *Public Prosecutor* v. *Wong Peng Wah & 2 Ors.* [1948] M.L.J. 131.

(2) *Toh Ah Loh & Anor.* v. *R.* [1949] M.L.J. 54 at p. 55.

CRIMINAL APPEAL.

A. Jayadeva for the appellant.

Adnan bin Dato' Shuib (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Yong J.: The accused, now the appellant, was convicted on two charges under section 9(a) of the Arms Act 1960 for having under his control (i) one 12-bore pistol and (ii) one round of 12-bore cartridge without an arms licence or permit, and was sentenced to six months imprisonment on each charge, the sentences to run concurrently.

The facts of the case are simple and straight forward. The police on information received searched the accused's house, and found the pistol and ammunition in the zinc gutter near the kitchen roof of the accused's house. The accused in his defence strenuously denied that the pistol and ammunition were his or that he had any knowledge of their existence. He explained that they must have been planted there by informers. On inspection, the court, the defending counsel and the deputy public prosecutor found that the zinc gutter where the pistol and ammunition were discovered was a place easily accessible to anyone standing outside the kitchen walls and the weapon could have easily been placed there without the knowledge of the inmates of the house.

The learned president in his grounds of judgment quite correctly held that section 47(2) of the Arms Act applied and the presumption therefore arose against the accused in whose house the pistol and ammunition were found. Section 47(2) reads as follows:—

"Every occupier of any house or premises in which any arms, ammunition or imitation arms are found shall for the purposes of this Act be deemed, until the contrary is proved, to have been in possession of such arms, ammunition or imitation arms."

The learned president, however, convicted the accused on this presumption of possession without further proof of *mens rea*. In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case. I am fortified in this opinion by the case of *Public Prosecutor* v. *Wong Peng Wah & Ors.*[1] followed in *Toh Ah Loh and Mak Thim* v. *R.*[2]

There are other aspects of the case where the learned president has misdirected himself. On page 13 of his grounds of judgment he, in rejecting the accused's explanation held that the accused had "failed to provide any explanation as to why people should want to put him into trouble by planting the pistol in his house. He (the accused) could not even name any person who was likely to be his enemy or who had any grudge against him."

In my view the learned president has overlooked the fact that the motive for planting arms and ammunition into another man's house need not necessarily be enmity or revenge. Such motive has frequently been found to have been impelled by tempting rewards offered by the police. Under section 38 of the Arms Act even the court in case of conviction, is authorised to pay out of the fines imposed, awards to the informers.

In another passage on the same page, the learned president said that "if the pistol and the cartridge had in fact been planted there by someone who later informed the police, then he would certainly indicate the exact spot where the exhibits could be located" and the police could have easily discovered them within minutes instead of nearly one hour.

In my view this merely shows the ingenuity of the informer who knows that if the weapon alleged to have been hidden is too easily and quickly discovered by the police who goes straight to the spot, the court trying the case may feel suspicious; there may be no conviction and therefore no reward.

In the instant case, the accused has given an explanation which is consistent with his innocence and if the learned president disbelieved his explanation, he must consider whether it might reasonably be true although not convinced of its truth. He has failed to do this.

I allow this appeal. The conviction and sentences are set aside and the pistol and other exhibits are to go to the police.

Appeal allowed.

Solicitors: *Jayadeva, Zahir & Ismi.*

RICHARD YAP v. MUSTAPHA

[O.C.J. (Lee Hun Hoe J.) December 8, 1967]
[Jesselton — Election Petition No. 5 of 1967]

Election Petition — Withdrawal of — Application for — Failure by solicitor to file affidavit in compliance with Election Petition Rules, 1954, r. 21(2) — Dispensation — Discretion of election judge.

The petitioner applied for leave to withdraw the election petition taken out by him. The petitioner's solicitor did not file an affidavit in compliance with rule 21(2) of the Election Petition Rules, 1954.

Held: (1) having regard to the evidence the election judge was satisfied that no unlawful agreement or undertaking had been entered into in relation to the withdrawal and leave was accordingly granted to the petitioner to withdraw his petition;

(2) in view of the peculiar circumstances of the case the affidavit of the petitioner's solicitor was dispensed with under the proviso to rule 21(2) of the Election Petition Rules, 1954.

Per Curiam: An election petition can only be withdrawn with the leave of the judge. It is important for the judge to exercise his discretion with great care. Such leave will only be granted if he is satisfied that no unlawful agreement or undertaking has been entered into in relation to the withdrawal.

Cases referred to:—

(1) *Hartlepool Election Petition* (1869), 19 L.T. 821 & 822.

(2) *County of Durham (North Division) Election Petition* (1874), 31 L.T. 321.

ELECTION PETITION.

Petitioner in person.

Dato' Eusoffe Abdoolcader (*W. K. Loo* with him) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe J.: This is an application for leave to withdraw an election petition. It is common knowledge that the first direct election to the State Legislative Assembly was held on various dates in April, 1967. The result of the election was published in the *Gazette* on 10th May, 1967. The petitioner Richard Yap and the respondent, Tun Mustapha, were both candidates